

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ARCHER AND WHITE SALES, INC.

Plaintiff,

v.

HENRY SCHEIN, INC., et al.

Defendants.

Civil Action No. 2:12-CV-00572-JRG

**NOTICE OF CONFLICT AND OBJECTION TO
JANUARY 29, 2020 TRIAL SETTING**

Defendants file this notice of conflict with the newly-ordered January 29, 2020, trial setting and object as follows:

On September 30, 2019, this Court ordered the parties to appear for jury selection and trial on February 3, 2020. (Dkt. No. 430). Since that Order, Defendants have raised no scheduling conflict and have diligently cleared schedules for fact witnesses, expert witnesses, and counsel to prepare for this trial setting and are fully prepared to proceed as scheduled on February 3.

On December 30, 2019, the parties submitted a joint pretrial order wherein Plaintiffs requested 25 hours per side and Defendants requested 16 hours per side in the hope trial could be completed within one to two weeks. (Dkt. No. 462 at 35). In response, at the January 13, 2020 hearing, this Court proposed permitting 18 to 19 hours per side to accommodate Plaintiffs' request for additional time and moving the trial setting to January 29, 2020. Defendants voiced initial concerns of potential conflicts for witnesses at the January 13 hearing. (1/13/2020 Hrg. Tr. at 74-76). And having subsequently consulted their counsel and witnesses, Defendants are now aware of several significant conflicts with a January 29, 2020 trial setting. *See Tinnus Enterprises, LLC*

v. Telebrands Corp., No. 6:16-CV-00033-RWS, 2017 WL 2989203, at *2 (E.D. Tex. May 30, 2017) (denying an alleged error in trial setting because the defendants did not raise their conflicts, explaining that “parties are of course free to raise such a conflict with the Court”). As such, Defendants assert the following conflicts with the newly-ordered January 29, 2020 trial setting:

- 1) Defendants’ expert witness Dr. Keith Ugone is being deposed in case number N17C-05-020 PRW CCLD, the Superior Court of the State of Delaware, on Friday, January 31, which is the last day ordered by the court for expert depositions. He will be engaged in preparation for that deposition on Thursday, January 30; as such, he will be unavailable to attend trial during the beginning of plaintiff’s case, which he would normally attend and for which he has been engaged to attend, prior to February 3, 2020. Dr. Ugone is central to Defendants’ case and his presence is essential to the defense and its ability to address Plaintiff’s fluid and ever changing theory of damages.
- 2) Kirk Zambetti, a former Dental Equipment LLC employee who is the key figure who objectively assessed the distributors from 2009 to 2016 and terminated plaintiff and more than fifty other distributors in 2014, has an irreconcilable conflict January 29-31. Mr. Zambetti is now Senior Vice President at Yeti, who has a board meeting in Austin, Texas and an additional required meeting in Denver, Colorado during that time. As such, he cannot attend trial those days during the plaintiff’s case. Given that he is a third party witness but is key to the defense of the case and plans to serve as a corporate representative, his absence—especially not being able to attend the plaintiff’s case in chief where the complaints are directly made against him—will greatly prejudice the defendants’ case. *See U.S. ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1296–97 (10th Cir. 2010) (affirming ruling that former employee could appear as defendants’ corporate representative and

remain present during the testimony of other witnesses pursuant to Rule 615(c) because the former employee was the person most knowledgeable about the history and complex factual details of the matters at issue, and with whom counsel needed to confer during trial).

- 3) Peter Foster, who was intimately involved with some of the decisions challenged in this litigation and may serve as a corporate representative for some of the dental manufactures (depending on the trial start date and availability of other witnesses), has significant oral surgery on January 23 and has a required post-operative visit thereafter.

Defense counsel has conferred with Plaintiff's counsel, and while they are still discussing the issue, the parties have not been able to reach an agreement. Although we appreciate the Court's efforts to accommodate the parties' requests, for the aforementioned reasons, Defendants respectfully object to the new January 29, 2020 trial setting and respectfully request the Court return the trial setting to February 3, 2020 to be completed in one week. As an alternative, Defendants propose that the Court conduct jury selection during the week of January 27th and commence the trial on February 3, 2020, allowing 15-16 hours per side, anticipating the trial will be completed in one week or possibly include the following Monday, February 10th.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 14th day of January 2020.

/s/ Jennifer H. Doan
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